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February 19, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W., Suite TW-A325
Washington, D.C. 20554

Re: Reply Comments of Time Warner Cable in *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 98-82 *et al.*

Dear Mr. Caton:

Please find enclosed for filing in the above-referenced proceeding the original and 16 copies of the Reply Comments of Time Warner Cable. In accordance with the Public Notice issued in this proceeding, six additional copies of the Comments have been delivered to the staff of the Cable Services Bureau and one copy has been delivered to Qualex International.

Also enclosed for date-stamping is one extra copy of the Reply Comments. Please date-stamp and return that extra copy in the self-addressed, stamped envelope that has been provided.

If you have any questions, please call me at 202-326-7945.

Very truly yours,

Henk Brands

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/M.D.S. Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154
	)	

REPLY COMMENTS OF TIME WARNER CABLE

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February 19, 2002

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Summary and Introduction

In *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.) ("*Time Warner II*"), *cert. denied*, 122 S. Ct. 644 (2001), the United States Court of Appeals for the District of Columbia Circuit invalidated the Commission's 30-percent subscriber limit, its 40-percent channel-occupancy limit, and two aspects of its attribution rules. The Commission has sought comment on whether these rules should be reinstated. *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312 (2001) ("*FNPRM*"). The great weight of the comments supports the conclusion that the Commission should not do so.

I.

In the last round of rulemaking, the Commission attempted to justify a 30-percent subscriber limit on the theory that it was necessary to prevent the two largest cable operators from foreclosing entry by new video-programming services. *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098 (1999) ("*Third Report*"). The D.C. Circuit set aside the resulting 30-percent limit because the Commission failed to demonstrate, as required by the First Amendment, that the posited form of foreclosure was a non-conjectural harm justifying the limit's burden on cable operators' speech. In the *FNPRM*, the Commission sought evidence substantiating the foreclosure theory; it also sought comment on a number of new subscriber-limit theories.

As the comments demonstrate, foreclosure of entry by new video-programming services has never constituted a non-conjectural problem. Video-programming services are thriving.

Competition from Direct Broadcast Satellite ("DBS") operators has further undermined the foreclosure theory, eliminating any theoretical incentive that cable operators might have to refuse to carry attractive programming. Vertical integration between cable operators and video-programming services does not make the threat of foreclosure any less conjectural: a cable operator that denies carriage to an attractive video-programming service to benefit affiliated programming would only encourage subscribers to switch to DBS. Thus, a subscriber limit is unnecessary. Moreover, a subscriber limit would do substantial harm by eliminating efficiencies that benefit consumers.

The comments further demonstrate that the open-field approach could not justify a percentage limit. The open-field approach depends on three assumptions: that video-programming services need to reach approximately 15 million MVPD subscribers to attain viability; that 50 percent of the subscriber universe will be unavailable to them even in the absence of active discrimination (so that a 40-percent open field is required); and that the two largest cable operators might collude in denying carriage (so that the limit should be set at 30 percent). Each of these assumptions is wrong.

The assumption that cable operators will collude in denying carriage lacks any theoretical or empirical support. It ignores laws prohibiting collusion, the competitive realities of the MVPD industry, and the difficulties inherent in collusion. Accordingly, the open-field approach could at best justify a 60-percent limit. And, because the two other open-field assumptions also remain unsupported, even a 60-percent limit cannot be sustained. Many video-programming services have operated with fewer than 15 million subscribers for a sustained period, and there is no evidence that changed circumstances mean that a video-programming service now requires more than 15 million subscribers. Similarly, the 50-percent-penetration assumption is not overly conservative; if anything, it artificially deflates penetration levels by including recent entrants.

The suggestion that the Commission should nevertheless impose a subscriber limit to promote diversity is unavailing. The subscriber-limit statute, which provides that the Commission should ensure that "no cable operator or group of cable operators can *unfairly* impede" the flow of programming to the consumer, 47 U.S.C. § 533(f)(2)(A) (emphasis added), does not authorize the Commission to regulate solely in the interest of diversity. Moreover, a subscriber limit would do nothing to increase diversity, and small incremental increases in diversity could not justify infringement on cable operators' speech. Besides, the diversity concern cannot be of help in choosing one limit over another.

The other concentration-related "problems" identified in the *FNPRM* also fail to justify a subscriber limit. Only two of these "problems" (program access and programming variety) were even mentioned by any of the commenters advocating further regulatory intervention. Program-access concerns cannot justify any subscriber limit: there is no evidence that such concerns pose a non-conjectural problem, and, in any event, a limit would do nothing to prevent a cable operator from denying access to programming. Concern about programming variety is also unwarranted, and there is no reason to believe that a subscriber limit would promote variety.

Commenters' additional regulatory suggestions must also be rejected. *First*, antitrust limits on horizontal mergers do not suggest that the statute requires a 30-percent limit. There is no indication that Congress intended reference to antitrust doctrine, which does not impose any

30-percent limit in any event. *Second*, the statute does not require that the Commission revert to the "homes passed" measure. The Commission was correct in concluding that actual subscriber numbers provide the most accurate measure of purchasing power. *Finally*, the suggestion that the Commission should adopt regional subscriber limits to address regional program-access concerns should be rejected for the same reasons that a national limit cannot be justified by such program-access concerns. Besides, regional subscriber limits would deny consumers the benefit of efficiencies and are without basis in the statute.

II.

A channel-occupancy limit is neither necessary nor appropriate. None of the comments advocating further regulation even mentions a channel-occupancy limit. This complete absence of support conclusively demonstrates that there is no non-conjectural problem that could justify a channel-occupancy limit.

Argument

I. A SUBSCRIBER LIMIT IS NEITHER NECESSARY NOR APPROPRIATE.

Because a subscriber limit would burden speech protected by the First Amendment, the Commission may impose a subscriber limit only if it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary." *Time Warner II*, 240 F.3d at 1130 (internal quotation marks omitted). The Commission therefore must "demonstrat[e] that the recited harms are real, not merely conjectural," through "reasonable inferences based on substantial evidence." *Id.* at 1130, 1133 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664, 666 (1994) (plurality)).

In the last round of rulemaking on subscriber limits, the Commission attempted to justify a 30-percent subscriber limit on the theory that it would prevent the two largest cable operators from foreclosing entry by new video-programming services. *See Third Report* ¶ 53. The Commission's reasoning had three by now familiar steps. *First*, the Commission estimated that a new video-programming service needs about 15 million subscribers to become economically viable. *See id.* ¶ 41. *Second*, the Commission estimated that, on average, a new video-programming service would have only a 50-percent chance of gaining carriage on cable systems not actively denied to it. *See id.* ¶¶ 48-50. *Finally*, the Commission suggested that the two largest cable operators might deny carriage collusively. *See id.* ¶ 53.

In *Time Warner II*, the D.C. Circuit, reserving judgment on the first two steps of the Commission's foreclosure theory, held that the Commission had failed to substantiate the third step. *See* 240 F.3d at 1132 (concluding that there was no "record support for inferring a non-conjectural risk of collusive rejection"). In the *FNPRM*, the Commission sought evidence substantiating the foreclosure theory. *See FNPRM* ¶¶ 55-58. In addition, the Commission sought comment on a number of subscriber-limit justifications other than the foreclosure theory. *See id.* ¶¶ 27-45.

None of the comments submitted in response to the *FNPRM* provides evidence of a non-conjectural problem justifying the imposition of a subscriber limit. The foreclosure theory has become ever less plausible as DBS has gained subscribers, thereby eliminating any theoretical incentive that cable operators might have to refuse to carry attractive programming. Indeed, the great weight of the comments filed in this proceeding supports the view that the foreclosure theory has no basis in law, logic, or experience.[1] Similarly, none of the comments provides evidence supporting the alternative justifications suggested in the *FNPRM*, and the comments of Time Warner Cable and others demonstrate that the Commission's suggested alternative bases lack all foundation.[2] Accordingly, the Commission should determine that the only "reasonable" subscriber limit would be *no* subscriber limit.

A. The Comments Submitted in This Rulemaking Fail To Provide Any Evidence That Foreclosure of Entry to New Video-Programming Services Constitutes a Non-Conjectural Problem.

Of all the commenters, only the Consumer Federation of America ("CFA") attempts to support the theory that large MSOs might collude to foreclose entry by new video-programming services. But CFA's support for the foreclosure theory falls far short of the

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[1]*See* Time Warner Cable ("TWC") Comments at 10-18; AT&T Corp. ("AT&T") Comments at 30-38, 49-54; Comcast Corporation ("Comcast") Comments at 17-20; National Cable & Telecommunications Association ("NCTA") Comments at 11-15; Progress and Freedom Foundation Comments at 7.

[2]*See, e.g.*, TWC Comments at 28-35; AT&T Comments at 40-41.

substantial evidence that would be needed to justify a subscriber limit in the face of First Amendment scrutiny.

1. There Is No Evidence That Video-Programming Services Are Being Foreclosed.

As several commenters note, video-programming services are thriving. *See* TWC Comments at 14-18; AT&T Comments at 25; Comcast Comments at 28. There are currently 294 programming networks, up from 99 in 1993. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, CS Docket No. 01-129, FCC 01-389, ¶ 14 (rel. Jan. 14, 2002) ("*Eighth Competition Report*"). The fees that MVPDs pay to video-programming services likewise are on the rise: they have increased significantly even between the Seventh and Eighth Competition reports. *Compare Eighth Competition Report* ¶ 22 ($6.4 billion in license fees for basic programming in 2000) *with Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, ¶ 24 (2001) ("*Seventh Competition Report*") ($5.5 billion in license fees for basic programming in 1999). And the number of independent programmers is also growing steadily. *See FNPRM* ¶ 79 (in September 2001, only 25 percent of all video-programming services were vertically integrated, versus 53 percent in 1994); TWC Comments at 17; AT&T Comments at 25. All these trends are simply incompatible with any notion that video-programming services require protection from monopsony power exercised by cable operators.

Increases in channel capacity have further facilitated entry by new video-programming services. As the *FNPRM* and the comments note, channel capacity has increased significantly in recent years. *See FNPRM* ¶¶ 25, 42, 78; TWC Comments at 13; AT&T Comments at 24. On average, cable systems now provide 80 analog channels. *See FNPRM* ¶ 25. Many cable operators also offer digital programming packages, and projections suggest that penetration of such packages will increase significantly in the coming years. *See* Paul L. Joskow & Linda McLaughlin, *An Economic Analysis of Subscriber Limits* 5 & n.10 (Jan. 3, 2002) ("Joskow & McLaughlin") (attached to TWC Comments at Tab 1) (penetration projected to reach as much as 70 percent by 2005). These increases in capacity facilitate entry by making it less likely that cable operators must decline to carry attractive programming for lack of available channels.

All of these factors point to the conclusion that any concern with foreclosure is simply unrealistic, and that a subscriber limit is therefore inappropriate.[3] That conclusion is bolstered by the complete absence of any comments by video-programming services. If foreclosure were a non-conjectural concern, its victims would no doubt have made themselves heard.[4] Although CFA attempts to show that some programming has been foreclosed, its assertions are unsupported. For example, CFA laments the changes in format made to the Trio network when it was sold to USA, but it offers no reason to believe that the "before" format was better than the "after" format. *See* CFA Comments at 134. Similarly, CFA asserts that Fox News

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[3]*See, e.g., Fox Television Stations, Inc. v. FCC*, No. 00-1222 (and consolidated cases) (D.C. Cir. Feb. 19, 2002) ("[T]he Commission has not shown a substantial enough probability of discrimination to deem reasonable a prophylactic rule as broad as the cross-ownership ban, especially in light of the already extant conduct rules.").

[4]Although Sherjan Broadcasting ("Sherjan") and the United States Conference of Catholic Bishops ("COCB") suggest that they have experienced difficulty obtaining carriage, neither is a basic video-programming service. Apparently, Sherjan is a user of leased-access channels, while the COCB is a user of public-access channels. *See* Sherjan Comments at 3; COCB Comments at 3-4.

and BBC America experienced initial difficulties finding carriage, *see id.* at 132-33, but CFA simply ignores that these networks are in successful operation.

In any event, CFA does not even attempt to show that its concerns would have been addressed by a subscriber limit. Nor could it: because large cable operators generally offer more channels than small cable operators, new video-programming services' difficulties in gaining carriage might have been worse with an exacting subscriber limit in place. *See* TWC Comments at 18.

2. Cable Operators Could Not Foreclose Entry by New Video-Programming Services.

The weight of the comments supports the view that, in light of competition between cable operators and DBS, a cable operator's attempt to foreclose entry by a new video-programming service would be unprofitable. *See* TWC Comments at 12; AT&T Comments at 35-36; Comcast Comments at 20; NCTA Comments at 14. In practice, cable operators simply cannot afford to refuse to carry attractive programming. If they do, they will lose subscribers to DBS or other MVPDs. *See Time Warner II*, 240 F.3d at 1134 ("If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch."); *FNPRM* ¶¶ 22, 42, 65 n.148; TWC Comments at 12-13.

CFA nonetheless attempts to show buying power by relying on national cable subscriber shares. *See* CFA Comments at 106-37. CFA ignores that there are purchasers of video programming other than cable operators. *See Eighth Competition Report* ¶ 150. Indeed, the universe of purchasers of video programming is not limited to MVPDs or to the United States; for example, it includes broadcasters and international purchasers. *See id.* ¶ 138. Besides, because the supply of video programming is elastic, video-programming services are not susceptible to monopsonistic abuse. *See* Joskow & McLaughlin 8-10; AT&T Comments, App. A (Janusz Ordover Decl.) ¶ 67.

CFA nevertheless contends that cable operators have market power. *See* CFA Comments at 51-148, 191-94. CFA refuses to recognize that DBS has significantly eroded cable operators' share of the MVPD subscriber universe. CFA further ignores that local monopoly power, by itself, cannot provide a theoretical basis for a horizontal cap. A horizontal cap would not prevent the industry from dividing up into many local monopolies, each below the national limit.[5] CFA's attempts to show market power by using the Implicit Lerner Index and Tobin's Q are thus unconvincing.

The Lerner Index measures the ability of a cable operator to charge its local subscribers prices greater than marginal cost. *See FNPRM* ¶ 62 n.142. A cable operator's power over its local subscribers would be the same whether many small cable operators each owned one monopoly system or one large MSO controlled many monopoly systems. But, as already explained, local monopoly power (which is absent in any event) could not justify a horizontal cap. Besides, the Lerner Index is not helpful in assessing market power in an industry with massive fixed costs in plant and equipment.[6]

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[5]*See* AT&T Comments at 38 (it is "wholly irrelevant whether a cable company could exercise *retail* market power over consumers in any particular local market"); RCN Telecom Services, Inc. ("RCN") Comments at 6 ("RCN is not principally concerned about the total number of MVPD subscribers served by any particular MSO, so long as it is not frozen out of one of its target markets by anticompetitive tactics").

[6]*See, e.g.*, William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 939 (1981) ("[w]hen the deviation of price from marginal cost . . . reflects certain fixed costs, there is no occasion for antitrust concern") (footnote omitted);

Tobin's Q, which compares a firm's market value to the cost of replacing its assets, *see id.* ¶ 62 n.143, also measures power over local distribution of programming. CFA offers no reason why the market value of a cable system would reflect nationwide market power over video-programming services rather than local market power. Thus, the Q ratio fails to substantiate CFA's case for a horizontal limit. Moreover, with specific regard to the cable industry, the Commission has previously avoided the calculation of replacement costs as being unduly complex and manipulable.[7]

The HHI figure that CFA offers (at 113-15) also falls far short of making the case that cable operators have buying power over video-programming services. The HHI measures only present market shares and thus ignores that "a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition." *Time Warner II*, 240 F.3d at 1134. CFA tries to avoid this defect by contending that DBS is not a substitute for cable, and that demand for cable is therefore inelastic. In light of the abundance of unrebutted evidence that DBS is a substitute for cable, however, this argument is unconvincing.[8]

Michael S. McFalls, Policy Planning, Federal Trade Commission, *The Role and Assessment of Classical Market Power in Joint Venture Analysis*, Pt. III.A at n.26 (Oct. 1997) ("[W]hen firms have high fixed costs relative to sales, the Lerner Index could approach 1 even in industries with low barriers to entry."), http://www.ftc.gov/opp/jointvent/classic8.htm.

[7]*See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527, ¶ 62 (1994) ("we reject the replacement cost . . . approach[] as unwieldy, difficult to apply consistently, and likely to produce ratebase values that would not generate reasonable rates").

[8]The Writers Guild of America ("WGA") and RCN also contend that DBS is not a significant competitor to cable. *See* WGA Comments at 9; RCN Comments at 13-14. WGA

The Commission has acknowledged that "DBS is a substitute for cable services." *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, Report on Cable Industry Prices, 16 FCC Rcd 4346, ¶ 53 (2001) ("*2001 Cable Rates Report*"); *see also FNPRM* ¶ 22 n.65. DBS, which now serves more than 17.2 million MVPD subscribers, competes head-to-head with cable operators.[9] DBS added 3 million subscribers in the year ending in June 2001 — a 19-percent increase. *See Eighth Competition Report* ¶ 57. By contrast, cable added 1.3 million subscribers — up only 1.9 percent. *See id.* ¶ 18. A recent study shows that DBS has 14.5-percent penetration in the areas served by the top 10 MSOs, which refutes the claim made by CFA (at 158-71) that DBS primarily serves areas that are not served by cable. *See* http://www.centris.com/studies/mso_overview.html.

With the Satellite Home Viewer Improvement Act on the books, CFA's claim (at 162) that "local programming is more limited for satellite" is increasingly inaccurate. DirecTV and EchoStar offer local programming and a nationwide PBS feed to subscribers. *See Eighth Competition Report* ¶ 59. DirecTV recently announced that it is adding more than 200 additional local channels in its 41 local-channel markets and that it will add 10 local-channel

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contends that DBS is not big enough to be a significant purchaser of programming, and RCN contends that the statistics overstate the importance of DBS and other MVPDs. But DirectTV is the third largest MVPD, and Echostar is the sixth largest. *See Eighth Competition Report* ¶ 57. If the proposed merger between the two is approved, the merged entity will become the first or second largest MVPD.

[9] *See* SkyREPORT, *National DTH Counts*, http://www.skyreport.com/dth_us.htm (November 2001 data).

markets this year.[10] All told, these markets include 67 percent of U.S. television households. *See id.* EchoStar also recently announced that it is adding local channels in the 36 local markets that it currently serves.[11]

3. Vertical Integration Does Not Make the Threat of Foreclosure Any Less Conjectural.

Contrary to CFA's suggestion (at 93-105), vertical integration between cable operators and video-programming services provides no additional support for any foreclosure theory. Although CFA makes it appear as though vertical integration raises additional concerns, there could not possibly be any non-conjectural problem without vertical integration. That is so because, without more, entry by new video-programming services benefits cable operators. Thus, unless one considers vertical integration (which allows scenarios in which cable operators try to fence out newcomers to benefit affiliated video-programming services), a foreclosure theory is not even rational. *See* TWC Comments at 15-16. And, as already explained, even in the presence of vertical integration (a waning phenomenon in any event), there has never been a showing that a non-conjectural harm actually exists. *See id.* at 16-17. Besides, consideration of the effect of vertical integration is incomplete without consideration of the significant and growing presence of DBS in the MVPD industry. Competitive pressure eliminates any incentive for vertically integrated cable operators to attempt to foreclose programming that competes with affiliated programming. *See* TWC Comments at 12-13, 16-17.

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[10]*See* DirecTV Press Release, *More Than 200 Additional Local Channels Now Available to DirecTV Customers in 41 Markets* (Dec. 27, 2001); DirecTV Press Release, *DirecTV to Launch Local Channels in 10 Markets This Year* (Jan. 8, 2002).

[11]*See* Echostar News Release, *EchoStar's DISH Network To Offer Additional Local TV Channels in 36 Markets* (Dec. 27, 2001).

4. A Subscriber Limit Would Do Substantial Harm.

The *FNPRM* requested comment on the potential benefits of concentration. *See FNPRM* ¶ 36. In apparent response, CFA offers only a theoretical treatment of monopoly. *See* CFA Comments at 62-65.

CFA's discussion ignores the benefits of concentration in the MVPD industry, which the statute specifically directs the Commission to take into account. *See* 47 U.S.C. § 533(f)(2)(D). *First*, large MSOs can operate at lower cost than small MSOs. *See* TWC Comments at 18 (citing Joskow & McLaughlin 14-16, 25-26); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 43 (1992) (recognizing that consolidation in the cable industry leads to efficiencies in administration, distribution, and procurement of programming and promotes introduction of new services); S. Rep. No. 92, 102d Cong., 1st Sess. 33 (1991) (same). *Second*, large MSOs are significant innovators in the cable industry: large MSOs have been most active in offering new services like cable-modem service and telephony. *See* TWC Comments at 18 (citing Joskow & McLaughlin 22-23, 28). *Finally*, limiting the size of MSOs may actually impede entry by video-programming services by reducing overall channel capacity. *See* TWC Comments at 18-19.

B. Even if Foreclosure Constituted a Non-Conjectural Problem, the Open-Field Approach Could Not Justify a Percentage Limit.

The open-field theory fails not only because there is no evidence that video-programming services are being foreclosed, but also because there is no evidence that the open-field assumptions are correct. The open-field theory depends on three assumptions: first, that video-programming services need to reach 15 million subscribers to survive; second, that video-programming services on average will achieve only 50-percent penetration; and, third, that the two largest cable operators will collude to deny carriage. Only CFA even attempts to support these assumptions, and it fails to provide any convincing evidence.

1. Because the Assumption That Cable Operators Will Collude in Denying Carriage Is Flawed, the Open-Field Approach Could at Most Justify a 60-Percent Limit.

The collusion hypothesis is unsupported by any evidence. *See* TWC Comments at 20-23; AT&T Comments at 66-68; NCTA Comments at 19. Commenters supporting a subscriber limit fail to provide any evidence of past collusion or any plausible argument that MSOs might collude in the future.

CFA contends that concentration facilitates collusion because collusion becomes easier when there are fewer firms. *See* CFA Comments at 83-85. *Time Warner II* held, however, that the "economic commonplace that, all other things being equal, collusion is less likely when there are more firms" is not a sufficient basis to impose a subscriber limit. 240 F.3d at 1132-33. As the court put it, "[t]his observation will always be true, although marginally less so for each additional firm; but by itself it lends no insight into the question of what the appropriate horizontal limit is." *Id.* at 1133. CFA has offered no additional analysis to suggest that collusion is more likely when the largest firms serve more than 30 percent of the subscriber universe.

Moreover, the collusion theory, even if it were theoretically plausible, ignores the competitive realities of the cable industry. As the *Time Warner II* court and the Commission have recognized, MSOs attempting to work together to foreclose programming would lose subscribers to DBS. *See* 240 F.3d at 1134; *FNPRM* ¶¶ 22, 42, 65 n.148. The collusion theory also ignores the special attributes of the MVPD industry that make collusion particularly difficult. *See* TWC Comments at 22 ("It will be the rare case where each of multiple colluding cable operators would simultaneously see its own video-programming services challenged by new entrants.").

2. The Open-Field Assumptions Remain Unsupported.

The open-field approach cannot justify even a 60-percent cap. *See* TWC Comments at 23-28; AT&T Comments at 59-66. Contrary to the claims of CFA (at 48), the D.C. Circuit in *Time Warner II* did not endorse the open-field approach — it reserved judgment on it. *See* 240 F.3d at 1132 ("Assuming the validity of the premises supporting the FCC's conclusion that a 40% 'open field' is necessary (a question that we need not answer here) . . . ."). There is no support for either the assumption that video-programming services need 15 million subscribers to survive or the assumption that a video-programming service will achieve only 50-percent penetration.

CFA contends that video-programming services need to reach even more than 15 million subscribers to survive, supposedly because more subscribers are now necessary to attract advertising and to cover increasing programming costs. *See* CFA Comments at 198-200. That claim is fatally undermined by the continuing survival of many networks with fewer than 15 million subscribers. *See Third Report* ¶ 42 n.96; TWC Comments at 24 & n.29. Moreover, the evidence shows that video-programming services that reach fewer than 15 million subscribers do succeed in selling time to advertisers.[12]

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[12]For example, Cable Program Investor reported 1999 advertising revenue for Outdoor Channel, BET on Jazz, Style!, Great American Country, CNN/fn, Discovery Health, Ovation,

CFA suggests, however, that video-programming services' license fees have increased; that these increases reflect increased programming costs; and that, due to increased programming costs, a larger subscriber base is needed to attain viability. *See* CFA Comments at 198-200. But the license-fee increases on which CFA apparently predicates its argument likely involved well-established and popular video-programming services. The fact that some video-programming services have increased their license fees does not prove that programming costs for new entrants have increased. CFA offers no evidence of any such increases.

CFA further points (at 199) to some video-programming services' goal of reaching more than 15 million subscribers as suggesting that more subscribers are now needed to achieve viability. But it is hardly surprising that video-programming services do not limit their hopes to 15 million subscribers. That hardly means, however, that more subscribers are necessary to attain viability. CFA's reliance on the example of Bravo's goal of reaching 60 million subscribers is particularly unconvincing. *See* CFA Comments at 199. Bravo entered in 1979 and did not pass the 15-million-subscriber mark until 1995.[13]

CFA also claims that the Commission's 50-percent-penetration assumption was overly conservative. CFA notes that the Commission derived its assumption from average carriage rates of 36 to 53 percent and contends that the Commission should have chosen a lower figure for average penetration. *See* CFA Comments at 198. But these figures came from two

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MTV2, Recovery, INSP, and Goodlife, each of which had fewer than 15 million subscribers at that time. *See* Kagan World Media, *Cable Program Investor* 5 (Feb. 16, 2001); *id.* at 3 (May 24, 2001).

[13]*See* Kathryn Harris, *Cable Ready; Maverick CEO Charles Dolan's Vision Makes Cablevision a Powerhouse*, L.A. Times, Dec. 11, 1994, at D1.

separate data sets — they do not reflect a range from a single study. *See Third Report* ¶ 48. CFA's assertion that the Commission could have chosen a lower number is not an argument (and certainly is not evidence) that a lower figure is warranted. And, as Time Warner Cable explained in its initial comments, the 50-percent figure reflects penetration for recent entrants as well as mature services. *See* TWC Comments at 26-28. Thus, if anything, the 50-percent figure is too low.

C. The Goal of Promoting Diversity Does Not Provide a Basis for Any Subscriber Limit.

CFA, RCN, and WGA argue that, in deciding whether to adopt a subscriber limit, the Commission should rely on an interest in promoting a diversity of voices in the media. *See* CFA Comments at 30, 202-23; RCN Comments at 8-10; WGA Comments at 15. There are four reasons why the Commission should reject this suggestion.

First, Section 613(f)(2)(A), which provides that the Commission should ensure that "no cable operator or group of cable operators can *unfairly* impede" the flow of programming to the consumer, 47 U.S.C. § 533(f)(2)(A) (emphasis added), authorizes the Commission to regulate "*only* . . . actions that impinge at least to some degree on the interest in competition that lay at the heart of Congress's concern." *Time Warner II*, 240 F.3d at 1135. Thus, the Commission lacks authority to set a limit simply in the service of promoting diversity. *See id.* ("[W]e cannot see how the word unfair could plausibly apply to the legitimate, independent editorial choices of multiple MSOs.").

Second, a subscriber limit would not promote diversity. Speech in one community is made no more diverse by a law prohibiting the local cable operator from owning cable systems in other communities. Thus, a horizontal subscriber limit does nothing to promote a diversity of voices. Accordingly, a subscriber limit is not sufficiently tailored to any diversity concern to withstand First Amendment scrutiny.

Third, even if fragmented ownership of cable systems in different locations would promote diversity in some relevant way, the gain would not be great enough to justify as draconian a limitation on protected speech as a subscriber limit. Plainly, the Commission must consider the cornucopia of diverse speech that is now available from other electronic media, including DBS and the Internet.[14] As the D.C. Circuit held in *Time Warner II*, there comes a point at which an incremental increase in diversity ceases to be a government interest sufficiently important to justify infringement on cable operators' speech. *See* 240 F.3d at 1135. As the court noted, "each additional 'voice' may be said to enhance diversity. . . . But at some point, surely, the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest." *Id.*

Finally, any diversity concern can be of no help in setting a specific limit. Even if the Commission might claim that diversity is served if there are at least four MSOs in the marketplace, diversity does nothing to explain why the line should be drawn at four, and not at three or at five. As the D.C. Circuit recognized in *Time Warner II*, the goal of promoting diversity cannot provide a reasonable basis for choosing one limit over another. *See id.*

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[14]*See, e.g.*, *Fox Television Stations, Inc. v. FCC*, No. 00-1222 (and consolidated cases) (D.C. Cir. Feb. 19, 2002) ("[I]t is hard to imagine anything more relevant to the question whether the Rule is still necessary to further diversity.").

D. Only Two of the Other Concentration-Related "Problems" Identified in the *FNPRM* Were Mentioned in the Comments, and Those Concerns Are Even More Conjectural Than the Foreclosure Concern.

The *FNPRM* identified four potential problems in addition to foreclosure and sought comment on whether any of them provided a basis for a subscriber limit. *See FNPRM* ¶¶ 27-45. Of these concerns, only two — supposed concerns relating to program access and programming variety — were even *mentioned* in any of the comments supporting a subscriber limit. And these comments fail to show that the concerns constitute non-conjectural problems that would be resolved by a subscriber limit.

1. A Subscriber Limit Is Not Needed To Safeguard Competing MVPDs' Access to Programming.

The Broadband Service Providers Association ("BSPA"), RCN, Altrio Communications, Inc., *et al.* ("Altrio"), and CFA contend that some cable operators have refused to share with their competitors certain terrestrially delivered regional sports programming that they have developed.[15] But the few isolated instances to which they point fall far short of the kind of pervasive problem that would be required to justify a subscriber limit. That is particularly true because, in the current record, there is no evidence that these supposed program-access concerns are severely impeding competition among MVPDs. Besides, as explained in TWC's opening comments, a subscriber limit would do *nothing* to address any program-access concerns that might exist. *See* TWC Comments at 30 n.37. Even if MSOs were limited in size, they would be no less able to deny access to programming.

[15]*See* BSPA Comments at 4-5; RCN Comments at 11-13; Altrio Comments at 11; CFA Comments at 123, 127-31.

2. Any Concern Over Diminished Programming Variety Is Unrealistic.

WGA contends that the quality, diversity, and creativity of broadcast and cable programming have diminished. *See* WGA Comments at 4, 8-9. This contention is belied by the enormous variety of programming on cable today. Tables D-1 and D-2 of the Eighth Competition Report list video-programming services specifically targeting pilots (Discovery Wings), golfers (Golf), Spanish speakers interested in nature and science (Discovery En Espanol), independent film buffs (The Independent Film Channel and the Sundance Channel), and those interested in things Celtic (Celtic Vision). These are but a few of the 294 national channels listed in the report. Cable programming simply does not suffer from a lack of variety, and WGA's assertion to the contrary is unsupported. WGA also fails to explain how a subscriber limit would promote programming variety. Indeed, because large cable operators tend to provide more channels than small cable operators, limiting the size of cable operators might injure diversity in programming. *See* TWC Comments at 35.

E. Commenters' Additional Suggestions Favoring Regulatory Intervention Must Be Rejected.

Commenters make three additional arguments for further regulation not mentioned in the *FNPRM*: (1) that a comparison between Section 613 and antitrust law shows that Section 613 requires at least a 30-percent subscriber limit; (2) that the Commission should revert to the "homes passed" measure for measuring a cable operator's reach; and (3) that the Commission should impose regional subscriber limits. Each of these suggestions should be rejected.

1. Contrary to CFA's Assertions, the Statute Does Not Require a 30-Percent Limit.

CFA argues that a comparison to antitrust law shows that Section 613 requires a subscriber limit no higher than 30 percent. *See* CFA Comments at 16-29. CFA contends that, under *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), a merger that would result in a firm controlling 30 percent or more of a relevant market is presumptively anticompetitive. *See* CFA Comments at 26. CFA further contends that Section 613(f)(1), by using the phrase "enhance effective competition," indicates a congressional intent that the Commission use a more interventionist approach than horizontal merger doctrine, which requires only that competition not be impeded. *See id.* at 20-21. Finally, CFA contends that a comparison of these requirements shows that the highest permissible limit under Section 613 is 30 percent. *See id.* at 27-29.

The 30-percent presumption relied on by CFA is not an accurate statement of current antitrust law on horizontal mergers. *See, e.g.*, *United States v. General Dynamics Corp.*, 415 U.S. 486, 497-98 (1974). Although CFA asserts that recent D.C. Circuit decisions have cited *Philadelphia National Bank* with approval, those decisions merely cited the case for the general proposition that certain concentration levels can give rise to a presumption of anticompetitive effect. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990). None of the decisions to which CFA points supports any hard-and-fast 30-percent presumption.

Moreover, any presumption of anticompetitive effect can be rebutted by "[n]onstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences" such as "ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition." *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1341 (7th Cir. 1981). In addition, a defendant may demonstrate circumstances that undermine the predictive value of the government's statistics. *See General Dynamics*, 415 U.S. at 506-10.

More fundamentally, antitrust law by its nature calls for subtle inquiries that antitrust enforcers and courts make on a case-by-case basis in light of all the relevant facts and circumstances. It would be odd to read Section 613 as ossifying one particular aspect of that analysis while ignoring all others, particularly because Congress has never charged this Commission with enforcement of the antitrust laws. Instead, Congress has directed the Commission to use its expertise to determine whether the cable industry is in need of a special-purpose rule concerning horizontal concentration — knowing full well that, even without such a rule, the generally applicable antitrust laws would continue to apply. As already explained, the facts and circumstances of the cable industry clearly show that no such rule is needed. Thus, no subscriber limit should be imposed — whether on the basis of a simplistic view of antitrust law or otherwise.[16]

2. The Commission Should Continue Relying on Actual Subscriber Numbers.

In the *Third Report*, the Commission decided to use actual subscriber numbers for purposes of its subscriber limit, instead of homes passed. *See Third Report* ¶ 22. In addition,

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[16]Besides, a true antitrust analysis would not (as CFA apparently would do) limit the relevant "market" to one particular kind of buyers of video-programming services. Instead, it would include all buyers, including at a minimum non-cable and foreign MVPDs.

the Commission decided to take account of non-cable MVPD subscribers in calculating the limit. CFA (at 45-47) contends that the Commission should undo both decisions.

CFA is mistaken on both counts. *First*, even when a cable operator's systems pass a large number of homes, the operator may have low penetration rates (*e.g.*, as a result of competition from other MVPDs). This "render[s] the number of homes passed an inaccurate indicator of the operator's market power." *Third Report* ¶ 22. *Second*, taking account of all MVPDs' subscribers is imperative if the object is accurately to gauge a cable operator's purchasing power. *See id.* ¶¶ 26-34. Video-programming services do not sell their product only to cable operators. Thus, failing to take account of DBS and other MVPDs would greatly overstate cable operators' power as purchasers of programming.[17]

3. The Suggestion That the Commission Should Impose Regional Subscriber Limits Should Be Rejected.

RCN, BSPA, and Sherjan suggest that the Commission should impose regional subscriber limits, supposedly to ensure that a regionally dominant cable operator cannot deny its competitors access to programming. *See* BSPA Comments at 5; RCN Comments at 11, 16-18; Sherjan Comments at 2. This suggestion should be rejected. As already explained, a subscriber limit (regional or otherwise) simply does nothing to ameliorate any program-access concerns.

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[17]CFA's contention (at 46-47) that the Commission's use of subscriber figures reported by a private company reflects an unlawful delegation of the Commission's authority is also wrong. The non-delegation doctrine limits delegations by *Congress* of its *legislative authority*. *See, e.g.*, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency."). The doctrine has no applicability here. Moreover, nothing in the statute requires the Commission to compile industry data by itself.

Moreover, regional subscriber limits would come at a significant cost. The Commission has repeatedly recognized that clustering provides significant benefits. *See Third Report* ¶¶ 62-63; *Eighth Competition Report* ¶¶ 140-141; TWC Comments at 18. Through clustering, MSOs can operate at a lower cost. *See 2001 Cable Rates Report* ¶ 39. In addition, there is strong evidence that clustering is negatively correlated with cable prices. *See Eighth Competition Report* ¶ 142. As the Commission has accordingly concluded, "the benefits of clustering — including market efficiencies and the deployment of telephony and Internet access services — outweigh any alleged anti-competitive effects on local programming." *Third Report* ¶ 63.

Besides, it is doubtful whether Section 613(f)(1)(A) even permits regional limits. Section 613 nowhere mentions regional limits, authorizing the Commission only "to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. § 533(f)(1)(A). By contrast, several other provisions of the 1992 Cable Act explicitly provide for region-specific treatment. *See id.* § 534 (defining markets of broadcast stations); *id.* § 548(c)(3) (geographic limitations on program-access requirements). The absence of any mention of region-specific subscriber limits in Section 613 strongly suggests that Congress did not intend them.

II. A CHANNEL-OCCUPANCY LIMIT IS NEITHER NECESSARY NOR APPROPRIATE.

No commenter supporting further regulation has even addressed the question whether the Commission should establish a channel-occupancy limit. This complete absence of support for a channel-occupancy limit conclusively demonstrates that there is no non-conjectural harm justifying a channel-occupancy limit. Thus, the channel-occupancy limit, like the horizontal subscriber limit, must be abandoned. *See* TWC Comments at 35-37; Cablevision Comments at 6.

Conclusion

For the reasons set forth above and in TWC's opening comments, the Commission should not adopt a subscriber limit, should not adopt a channel-occupancy limit, should not repeal the single-majority-shareholder exception, and should eliminate the no-sale criterion.

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February 19, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of February 2002, copies of the Reply Comments of Time Warner Cable were served upon the parties listed below by hand-delivery.

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